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In the Supreme Court of the United States

OCTOBER TERM, 1970

KENNETH A. MARSHALL AND YOICHI TAKAHASHI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 580

KENNETH A. MAKEKAU AND YOICHI TAKAHASHI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Hawaii, petitioner Makekau was convicted of selling heroin in violation of 21 U.S.C. 174 and 26 U.S.C. 4704(a); petitioner Takahashi was convicted of violating section 4704(a). Their convictions were based upon the testimony of government agents who had observed the defendants and an informer in the unlawful transactions. The informer did not testify at the trial.

Subsequent to indictment, the court required disclosure of the informer's identity, but issued a protective order, at the government's request, restraining counsel and defendants from contacting or attempting to contact the informer without prior authorization from the court (Pet. App. M). The protective order was issued as a result of numerous threats on the life of the informer and the killing of his wife (Vol. 7, pp. 8-12).[1]

Petitioners' motion to produce the informer for interview before the day of trial was granted (Vol. 3, p. 16). Prior to the trial date, which was postponed at petitioners' request (Vol. 4, p. 5), the informer disappeared; his whereabouts remained unknown until after petitioners' convictions despite diligent efforts by the government to locate him (Vol. 7, pp. 17-21). Because of the absence of the informer, petitioners moved to dismiss the indictments and suppress the testimony of government witnesses. The district court denied these motions in an extensive opinion (Pet. App. 1-31). The court of appeals affirmed *per curiam* (Pet. App. 32-34).

1. In substance, petitioners contend that they were denied effective assistance of counsel when the trial court restrained petitioners and their counsel from contacting the informer without prior authorization from the trial court (Pet. App. M); they also argue that their right to confront witnesses against them was violated when the government, after reasonable

[1] References are to the transcript of proceedings, on file with this Court. There are 19 volumes, one of which is unnumbered.

efforts, was unable to produce the informer just prior to and at the time of trial. These contentions are answered in the thorough opinions of the courts below on which we rely.[2]

2. Petitioners also maintain that the privilege of the Social Security Administration to refuse information in its records as to a registrant's whereabouts (42 U.S.C. 1306) violated their right to confront witnesses against them. Had the Social Security Administration released this information as requested, petitioners claim the informer would have been available for trial.[3] This contention was presented to the court of appeals in a motion to reopen in light of newly discovered evidence while the original appeal was pending. Subsequent to the judgment affirming petitioners' convictions, this motion was denied. There was no violation of petitioners' right to "confront" the informer since none of his testimony was introduced in the proceedings. *United States* v. *Kordel*, 397 U.S. 1, 10-11.

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[2] We note that this Court denied certiorari last Term in a related case in which similar claims were made based on the absence of the same informer, Takashima. *Fukumoto* v. *United States*, No. 1359 Misc. O.T. 1969, certiorari denied, 397 U.S. 998. The district court here refers to the case in its memorandum opinion (Pet. App. A 18).

[3] The claim that disclosure would have led to the informer is conjecture. Petitioners submitted an affidavit signed by the informer, who was found a year after the convictions, which asserts that he was working in Los Angeles and paying social security at a time when he could have been produced for trial. (Pet. App. G). The government, however, furnished an affidavit from the informer stating, in substance, that to avoid being found he had used fictitious addresses. (Unnumbered Vol., p. 20).

Moreover Congress has reasonably concluded that the need for confidentiality in Social Security records is sufficient to justify a refusal to divulge information in the agency's files.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1970.

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